U.S. Court of Appeals Docket No. 16-14225

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JESUS CAMACHO, surviving spouse of Stacey Camacho and LeJEAN NICHOLS, adminstratrix of the Estate of Stacey Camacho
Plaintiffs/Appellees,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY
Defendant/Appellant.

On Appeal from a Decision
of the United States District Court
for the Northern District of Georgia, Atlanta Division

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLEES

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CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae*, United Policyholders, states that it is a non-profit 501(c)(3) consumer organization, that it does not have a parent corporation, and that no publicly-traded corporation owns 10% or more of the stock of United Policyholders.

Dated: March 1, 2017

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 11th Cir. R. 26.1-1, 26.1-2, 26.1-3, I hereby certify the following persons or entities have an interest in the outcome of this case:

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STATEMENT OF *AMICUS CURIAE*

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, I hereby certify:

A. A party's counsel did not author the brief in whole or in part;

B. A party or a party's counsel did not contribute money that was intended to fund preparing or submitting the brief; and

C. A person - other than the *Amicus Curiae*, its member, or its counsel - did not contribute money that was intended to fund preparing or submitting the brief.

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I. INTEREST OF THE AMICUS CURIAE

United Policyholders ("UP") is a non-profit organization dedicated to helping preserve the integrity of the insurance system by serving as a voice and an information resource for insurance policyholders in all 50 states, including Georgia. United Policyholders' work is supported by donations, grants, and volunteer labor. This year marks the organization's 25th year of service. UP does not sell insurance or accept funding from insurance companies.

Much of UP's work is aimed at helping individuals and businesses be properly insured and successfully navigate the claim process after disasters. UP monitors legal and marketplace developments affecting the interests of all policyholders and all lines of insurance. UP is frequently invited to testify at legislative hearings and participate in regulatory proceedings on rate and policy issues. UP's Executive Director serves a consumer representative to the National Association of Insurance Commissioners and an as an Adviser to the American Law Institute's Restatement of the Law of Liability Insurance project.

UP advances policyholders' interests in courts across the U.S. by filing *Amicus Curiae* briefs in cases involving important insurance principles. UP has filed *Amicus Curiae* briefs on behalf of policyholders in more than 400 cases throughout the United States, including numerous cases before the United States Supreme Court, U.S. Courts of Appeal, and the courts of the State of Georgia.

UP's *Amicus* brief was cited in the United States Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). UP has been invited by many courts to participate in oral argument as *Amicus Curiae* and UP's arguments have been cited with approval in opinions issued by numerous state and federal courts.

In this brief, UP seeks to fulfill the "classic role of *Amicus Curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." (*Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).) This is an appropriate role for *Amicus Curiae*. As commentators have stressed, an *Amicus Curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings."[1] UP's depth of experience in guiding policyholders, both individual and commercial, through the insurance claims process makes it uniquely suited to provide a valuable perspective to the Court. Namely, that the duty of good faith and fair dealing is fundamental and where consumers have the legal right to hold an insurer accountable the promise of insurance protection, as they do in Georgia, that promise is most frequently honored. When it is not, such as where an insurer fails to settle a claim against its insured, the right to bring an action helps to level the uneven playing field.

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[1] Robert L. Stern et al., *Supreme Court Practice 570-71* (6th ed. 1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)).

II. FACTS AND PROCEDURAL HISTORY

For purposes of this *Amicus Curiae* brief, UP adopts and fully incorporates in this brief by reference the Statement of the Case and Facts filed by Plaintiff/Appellees Camacho *et al*.

III. SUMMARY OF ARGUMENT

Insurance is different.[2] Insurance spreads risk and provides financial security, making it possible for people and businesses to thrive. Insurance protection and coverage after an adverse event makes the difference between recovery and ruin. Because insurance is so important, it is a carefully regulated industry and imbued with the public interest.[3] Oversight agencies in every state

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[2] "…Once an insured files a claim, the insurer has a strong incentive to conserve its financial resources balanced against the effect on its reputation of a "hard-ball" approach. Insurance contracts are also unique in another respect. Unlike other contracts, the insured has no ability to "cover" if the insurer refuses without justification to pay a claim. Insurance contracts are like many other contracts in that one party (the insured) renders performance first (by paying premiums) and then awaits the counter-performance in the event of a claim. Insurance is different, however, if the insurer breaches by refusing to render the counter-performance." (*E.I. du Pont de Nemours & Co. v. Pressman,* 679 A.2d 436, 447 (Del. 1996).)

3 *See,* e.*g., Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946) ("[insurance] business affected with a vast public interest"); *Robertson v. California*, 328 U.S.. 440, 447 (1946); *United States. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 at n.14 (1944) ("evils" in the sale of insurance "vitally affect the public interest"); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) ("Government has always had a special relation to insurance."); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co*., 282 U.S. 251, 257 (1931) ("The business of insurance is so far affected with a public interest that the State may Regulate the Rates").

have the authority to regulate the financial affairs of insurance companies, the rates they charge, the way they sell their products and process claims submitted by policyholders. Legislatures have enacted statutes and courts have rendered decisions that define the standards that companies must adhere to when dealing with their insureds. In the end, however, it is up to private litigants, such as Plaintiffs/Appellees and State and Federal courts to enforce those standards.

The seminal Georgia Supreme Court decision of *Southern General v. Holt*, 262 Ga. 267, 416 SE 2d 274 (1992) holds that "…[a]n [insurer] may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim. (*Id.* at 268 (citing *McCall v. Allstate Ins. Co*., 251 Ga. 869, 870 (310 SE2d 513) (1984).) Further, the court held: "In deciding whether to settle a claim within the policy limits, the [insurer] must give equal consideration to the interests of the insured." (*Great American Ins. Co. v. Exum*, 123 Ga. App. 515, 519 (181 S.E. 2d 704) (1971).) The jury generally must decide whether the insurer, in view of the existing circumstances, has accorded the insured "the same faithful consideration it gives its own interest." (*Id*., citing see *U. S. Fidelity &c. Co. v. Evans*, 116 Ga. App. 93 (156 SE2d 809), aff'd, 223 Ga. 789 (158 SE2d 243) (1967).) Stated another way, if an insurer, negligently or intentionally, refuses to settle a claim against its insured within policy limits, it may be liable for any excess judgment.

Holt and its progeny are under attack. The insurance industry and their *Amici* contend that plaintiffs' attorneys are incentivized to "set up" insurers for bad faith lawsuits by "engineering" a dispute.[4] That contention could not be further from the truth. This ostensible justification for undermining *Holt* demonstrates that the insurance industry is on a virtual vendetta against the plaintiffs' bar, despite the thoughtful consideration of juries and judges that lead to the findings of bad faith that it contends are the product of "enterprising claimants" such as Camacho.[5]

The ability of an insured (or an injured third-party favored with an assignment of rights, as here) to hold an insurer accountable for negligence and bad faith is one of the most, if not the most fundamental right ones has to preserve the promise of the insurance contract. If this right is limited without proper cause, consumers will have little or no ability to enforce their rights if their insurer chooses to act unfairly in settling a claim. Almost every state recognizes a cause of action for bad faith and in those states the insurance markets are healthy and

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[4] *See, e.g., Holt* citing *Grumbling v. Medallion Ins. Co*., 392 F. Supp. 717 (D. Or. 1975)) "Nothing in this decision is intended to lay down a rule of law that would mean that a plaintiff's attorney under similar circumstances could "set up" an insurer for an excess judgment merely by offering to settle within the policy limits and by imposing an unreasonably short time within which the offer would remain open."

[5] See Amicus Curiae brief of the Georgia Chamber of Commerce (Motion for Leave at Page 7).

competitive, and consumers are generally treated fairly. Georgians count on the protections afforded to them in the civil justice system and they must not be eroded by powerful industry interests who fail to provide a compelling justification.

IV. ARGUMENT

A. IN ORDER TO MEET THEIR DUTY OF GOOD FAITH OF GOOD FAITH AND FAIR DEALING, INSURERS MUST GIVE EQUAL CONSIDERATION TO THE INTERESTS OF THE THEIR INSUREDS

It is well-establish law in Georgia that when an insurer acts in negligence and bad faith by failing to meet its obligation to settle claims against its insured, the insurer is liable for any judgment rendered against its insured, even it the verdict is in excess of the applicable policy limits. (*See Holt* and *McCall, supra.)* The logic of this rule is that an insurer has an opportunity to protect its insured by offering to settle injury claims by third parties for the available policy limits. When an insurer fails to "give equal consideration to the interests of [its] insured" by placing its profit motive ahead of the promise of protection, it does not meet its burden to act in good faith and is liable for the consequences. (*See Exum, supra.*[6])

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[6] *See, also, e.g.*, *Coleman v. Holecek*, 542 F.2d 532, 537 (10th Cir. 1976) (applying Kansas law and noting that "[t]he duty to consider the interests of the insured arises not because there has been a settlement offer from the plaintiff but because there has been a claim for damages in excess of the policy limits. This claim creates a conflict of interest between the insured and the carrier which requires the carrier to give equal consideration to the interests of the insured.")

It is not difficult to understand why such a rule exists in Georgia and many other states.[7] An insurer is financially incentivized to pay as little as possible on claims. The less it pays, the more it keeps in profits. In a typical injury case, if it can minimize the value of the claim with expert opinion or through attribution of fault, it is beneficial to the insurer but potentially, as in the case of the insured Seung Chun Park and assignee Camacho *et al*, results in a judgment ($5.8 million) far in excess of the policy limits ($100,000) The simple logic is that the insured cannot be responsible for a large verdict if it is the result of the insurer's negligent miscalculation or bad faith (*i.e.,* the failure to settle).

An insured wishes only for the promise of insurance protection. An insured who faithfully pays their insurance premiums expects that if and when it causes injuries to a third party when driving their automobile, the insurer will uphold its "end of the bargain" by settling any claims. In most cases, third parties are perfectly happy to settle for the policy limits of the at-fault driver, even if the injury (or death) far exceed the available limits of the insurance. The time and expense of litigation are not desired by the injured party or the surviving family

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[7] *See, e.g., Holtzclaw v. Falco, Inc.*, 355 So. 2d 1279, 1283–84 (La. 1977) ("an insurer must carefully consider the interests of its insured, instead of only consulting its own self-interests, when handling and settling claims in order to protect the insured from exposure to excess liability.")

members of a decedent, nor the at-fault driver/insured, which is precisely why every State (save New Hampshire), requires drivers to carry liability insurance.

However, when an insurer fails to hold up its "end of the deal," the law in a majority of jurisdictions rightly protects insureds – those without superior resources – from financially devastating consequences (*i.e.,* paying a $5.8 million judgment when the claim could have settled for the $100,000 policy limits).[8] In the liability insurance context, the duty of good faith and fair dealing is most clearly shown in how an insurer settles claims against its insured. When an insurer does not give "equal consideration" to the interests of its insured, it does not act in good faith. (*See Exum, supra.)*

B. INSURERS HAVE AN AFFIRMATIVE DUTY TO SETTLE CLAIMS AGAINST THEIR INSURED TO PROTECT THEIR INSURED FROM EXPOSURE TO AN EXCESS VERDICT

Returning briefly to the issue of whether under an insurer is obligated to respond to a settlement demand from a third party claimant, it is important to note that Georgia law does not absolve an insurer of liability for tortious refusal to settle

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[8] "The majority rule is that the measure of damages in a bad faith failure to settle case is the amount by which the judgment rendered in the underlying action exceeds the amount of insurance coverage." (*See Medical Mut. Liability Ins. Soc. of Maryland v. Evans*, 622 A.2d 103, 114 (Md. Ct. App. 1993); *See also* William T. Barker & Ronald D. Kent, *New Appleman on Insurance Bad Faith Litigation* § 9.03[2] (2d ed. 2011) ("…in an action for breach of the insurers duty to settle, an insured can recover the difference between the total amount of the judgment in the third party suit and the amount of the policy limits, plus interests and costs.")

in the absence of a settlement demand from the injured third-party. (*See Kingsley v State Farm Mut. Auto Ins. Co.* 353 F.Supp. 2d 1242 (N.D. Ga. 2005), *aff'd*, 153 F. App'x 555 (11th Cir. 2005).) Stated another way, "failure to either settle within policy limits or to make an offer of settlement creates an issue of bad faith…because the issue arises whether the insurer places its financial interest superior to the interests of its insured who is placed at great risk for an excess judgment." (*Thomas v. Atlanta Casualty Co.* 253 Ga. App. 204-05, 558 S.E.2d 432, 439 (2001).)

This is relevant because where an insurer receives a time-limited *Holt* demand, the logic of *Kingsley* and *Thomas* suggests that an insurer has a duty to settle within policy limits, either by accepting the *Holt* demand, or by affirmatively offering to settle. In either case, the insured is much less likely to be put in a position where it is exposed to an excess judgment because the insurer failed to fulfill its basic obligations to defend and indemnify its insured.

It is crucial to note that insurers are professional litigators. Insurers, unlike insureds are in the litigation business.[9] This is crucial point because it goes to the idea that an insurer cannot escape liability for exposing its insured to an excess

[9] *See* Lorelie S. Masters, Jordan S. Stanzler, & Eugene R. Anderson, *Insurance Coverage Litigation* § 1.01[b], at 1–10 (2d ed. 2000 & supp. 2015).

verdict on a technicality – for example, that the demand letter was not sufficiently definite or specific enough to accept. This type of argument amounts to a technicality, one which the professional insurer-litigator should be accustomed to and perfectly capable of adequately responding to in order to settle the claim and protect its insured. Thus, any argument that and insurer's negligence is a bar to an insured's ability to recoup an excess verdict fails and misunderstands Georgia law.

As the District Court correctly pointed out, "[u]nder Georgia law an 'excess liability action ... is premised on the possibility of settlement,' and therefore Plaintiffs must '[a]t a minimum, ... show that settlement was possible.'" (*Delancy v. St. Paul Fire & Marine Ins. Co*., 947 F.2d 1536, 1550 (11th Cir.1991).) The District Court went on to say that "[w]hile [plaintiff's counsel's] letter is not a model of clarity, when read as a whole against this legal backdrop of the dual-damages claims process in wrongful death cases, the Court cannot say that it is so vague as to be unenforceable." (*Camacho v. Nationwide Mut. Ins. Co.*, 13 F.Supp.3d 1343, 1359 (N.D. Ga. 2014).) Again, negligence and bad faith is premised on the failure to settle rather than the failure to satisfy the demand letter.

The point of the foregoing is to illustrate that because an insurer has the superior resources, knowledge, and experience, it has a responsibility to properly handle claims made against its insured. And in the appropriate cases, as here, the insurer must take positive steps to bring about a settlement that protects its insured

from the risk of an excess verdict, particularly when there has been a settlement demand.[10] Once an insurer breaches this duty and exposes its insured to an excess verdict, it cannot then argue its way out by pleading ignorance. This rule of fairness protects insureds, consumers, and injured parties, not "enterprising claimants" as insurers and their allies would have the Court believe.

IV. CONCLUSION

For the foregoing reasons, *Amicus Curiae* United Policyholders respectfully requests that this Court affirm the judgment of the District Court.

Dated: March 1, 2017

Respectfully submitted,

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[10] *See also,* Lorelie S. Masters, Amy R. Bach, and Daniel R. Wade, *The American Law Institute Principles/Restatement of the Law of Liability Insurance: Part III—Selected Comments From a Policyholder Perspective*, Lexis Nexis – Current Critical Issues (2015) (discussing the view taken by the Reporters of the American Law Institute in the draft of the Restatement of the Law of Liability Insurance that an insurer has an affirmative duty to make reasonable settlement decisions where the insured may be exposed to an excess judgment).

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March 2017, I electronically filed the foregoing *Amicus Curiae Brief of United Policyholders in Support of Appellees,* with the Clerk of the Court of the United States Court of Appeals by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rules 29(d) and 32(a)(7)(B) of Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font and contains 3,592 words not including footnotes. Footnotes contain an additional 620 words.

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I certify that this brief complies with the ECF compliance requirements of Federal Rules of Appellate Procedure:

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Dated: March 1, 2017

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